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No. 08-846

FILED
MAY 19 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NAVAJO NATION, *et al.*,

Petitioners,

v.

UNITED STATES FOREST SERVICE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

Louis Denetsosie[b]
ATTORNEY GENERAL
NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

Terence M. Gurley[d]
Zackeree Kelin
Kimberly Y. Schooley
DNA PEOPLE'S LEGAL
SERVICES
P.O. Box 306
Window Rock, Navajo
Nation (AZ) 86515

Jeffrey L. Fisher[a]
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

A. Scott Canty[c]
OFFICE OF GENERAL
COUNSEL
THE HOPI TRIBE
P.O. Box 123
Kykotsmovi, AZ 86039

[Counsel affiliations and additional counsel listed
on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

ADDITIONAL COUNSEL

Howard M. Shanker[b]
Laura Lynn Berglan
THE SHANKER LAW FIRM PLC
700 East Baseline Road, Bldg B
Tempe, AZ 85283

James E. Scarboro[c]
Timothy Macdonald
Holly E. Sterrett
ARNOLD & PORTER LLP
Suite 4500, 370 Seventeenth Street
Denver, CO 80202-1370

Jack F. Trope[d]
ASSOCIATION OF AMERICAN INDIAN AFFAIRS
966 Hungerford Drive, Suite 12B
Rockville, MD 20850

Thomas C. Goldstein[a]
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

Amy Howe[a]
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

---

[a] *Counsel for Petitioners*

[b] *Counsel for Petitioners Navajo Nation, White Mountain Apache Tribe, Yavapai-Apache Tribe, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, and Flagstaff Activist Network*

[c] *Counsel for Petitioner Hopi Tribe*

[d] *Counsel for Petitioners Hualapai Tribe, Norris Nez, and Bill Bucky Preston*

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REPLY BRIEF ROR PETITIONERS

Respondents cannot deny the extraordinary significance of this case to the petitioner tribes. Congress itself recognized in the American Indian Religious Freedom Act of 1978 that "the religious practices of the American Indian (as well as Native Alaskan and Hawaiian) are an integral part of their culture, tradition and heritage" because "such practices form the basis of Indian identity and value systems." Pub. L. No. 95-341 (1978). No religious practices are more fundamental to Southwest Indian tribes than those related to the San Francisco Peaks. *See* Pet. for Cert. 3-6. That is why the Navajo Nation, for instance, views the potential desecration of the Peaks with treated wastewater as "an emergency matter which directly threatens the sovereignty of the Navajo Nation." Resolution of the Twenty-First Navajo Nation Council, CAP-16-09 (Apr. 22, 2009). The twelve other tribes that revere the Peaks share this view with respect to their own tribal identities and religious customs.

This serious threat to the cultural traditions of thirteen dependent nations – representing over 400,000 Native Americans – is reason alone to grant review. *See, e.g., United States Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (granting certiorari in absence of circuit split because of appellate decision's "significant impact on the relationship between Indian tribes and the Government"); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (granting certiorari because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for

many eastern Indian land claims"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1972) (granting certiorari "because of the importance of the issues for [certain] Indians"); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 424 (1943) ("We granted certiorari because the case was thought to raise important questions concerning the relations between the two tribes and the United States."). But even setting that consideration aside, this case, contrary to respondents' arguments, easily meets this Court's criteria for certiorari. The Ninth Circuit erred in concluding that "subjectively" inhibiting the tribes' religious practices relating to their most sacred site would not substantially burden their free exercise of religion. And the Ninth Circuit's decision punctuates years of escalating conflict among the federal courts of appeals over how to construe and to apply RFRA's triggering mechanism.

1. Neither respondent even attempts to argue that the court of appeals' definition of the statutory phrase "substantial burden" accords with the words' ordinary meaning. Nor does either respondent try to reconcile the Ninth Circuit's definition with various types of encumbrances on religious liberty, such as enduring unwanted autopsies, that this Court and others have recognized that RFRA is meant to cover. *See* Pet. for Cert. 25; *Amicus* Br. of Religious Liberty Law Scholars 10-16 (collecting examples). That the Ninth Circuit's opinion cannot be defended on either of these elementary grounds of statutory interpretation – plain meaning and congressional purpose – demonstrates the need to grant certiorari.

The argument that respondents do offer in defense of the Ninth Circuit's opinion does little to

dispel the need for this Court's intervention. Respondents' argument proceeds in two steps. They first argue that "Congress intended courts to look to pre-*Smith* Free Exercise case law in construing the term 'substantial burden.'" Snowbowl BIO 14; *accord* SG BIO 12. Second, respondents argue that this Court's pre-*Smith* decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), establishes that interfering with Native Americans' ability to pursue spiritual fulfillment through land-based religious practices does not substantially burden their free exercise of religion. Neither of these propositions withstands scrutiny.

a. Nothing in RFRA directs courts to define "substantial burden" with reference to pre-*Smith* case law. As the petition for certiorari explains, that was not even a phrase that this Court's pre-*Smith* case law commonly used. *See* Pet. for Cert. 26.

To be sure, RFRA observes that "*the compelling interest test* as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5) (emphasis added). RFRA, therefore, provides that one of its purposes is "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." § 2000bb(b)(1). But neither of these statutory passages says anything about how to construe RFRA's distinct "substantial burden" requirement. When RFRA discusses *that* requirement in subsequent passages, it makes no reference whatsoever to pre-*Smith* case law. *See* § 2000bb(b)(1) (purpose of RFRA is "to guarantee [the application of

the compelling interest test] in all cases where free exercise of religion is substantially burdened"); § 2000bb(b)(2) (RFRA is intended "to provide a claim or defense to persons whose religious exercise is substantially burdened").

That being so, when the government says that "RFRA specifically points the courts to 'Federal court rulings' prior to *Smith* to assess whether a governmental action places an impermissible burden on religion," SG BIO 12 (quoting § 2000bb(a)(5)); *see also* SG BIO 19, it quotes RFRA's language out of context and misrepresents what RFRA provides. The fact is that Congress coined the term "substantial burden" in RFRA. While respondents and courts such as the Ninth Circuit may wish Congress had used the First Amendment's restrictive term "prohibit" (or some synonym such as "coerce") to tether the statute's triggering mechanism to pre-*Smith* case law, this does not justify acting as if Congress actually did so.

b. Even if this Court's pre-*Smith* free-exercise case law were relevant to construing RFRA's substantial burden requirement, nothing in *Lyng* suggests that significantly inhibiting individuals' subjective spiritual expressions does not "substantially burden" their exercise of religion. To the contrary, this Court took for granted in *Lyng* that the governmental action there would have "devastating effects" on traditional religious practices and would "virtually destroy the . . . Indians' ability to practice their religion." 485 U.S. at 451 (internal quotation marks and citation omitted).

This Court rejected the Native Americans' free exercise claim in *Lyng* not because of the absence of a

substantial burden, but rather because "[t]he crucial word *in the constitutional text* is 'prohibit.'" *Id.* (emphasis added). The *Lyng* Court acknowledged that it had stretched that term in other pre-*Smith* cases to cover "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Id.* at 450. This Court also has held that governmental action that "target[s]" an activity "because of its religious motivation" triggers strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 542 (1993); *accord id.* at 559 (Souter, J., concurring); *id.* at 577-78 (Blackmun, J., concurring). But the Court in *Lyng* refused to extend the term "prohibit" to cover "incidental" – that is, unintentional – "effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. at 450. *Lyng* held, in other words, that although the government's desecration of the Indians' sacred site would substantially burden their exercise of religion, the burden was incidental and therefore insufficient under the Free Exercise Clause to trigger *Sherbert* and *Yoder*'s compelling interest test. *See Employment Div. v. Smith,* 494 U.S. 872, 883 (1990) (explaining that *Lyng* "declined to apply *Sherbert* analysis to the Government's logging and road construction activities" because those activities were "generally applicable" governmental actions).

Once *Lyng*'s holding is brought into focus, the only real question is whether RFRA, like the Free Exercise Clause as explicated in *Lyng*, excludes substantial but incidental burdens on religious

practice from its coverage. The government claims that it does, asserting that "Congress did not intend RFRA's compelling interest test to apply to any incidental effects on religious exercise." SG BIO 17. But this Court has already squarely rejected that argument, explaining that the very purpose of RFRA is to trigger strict scrutiny *whenever* "the exercise of religion has been burdened in an *incidental* way," "without regard to whether [the governmental action] stifl[es] or punish[es] free exercise" or targets it for harmful treatment. *City of Boerne v. Flores,* 521 U.S. 507, 534-35 (1997) (emphasis added). (In fact, this expanded coverage beyond what the First Amendment provides is one reason why this Court held RFRA unconstitutional as applied to states. *See id.*) Neither respondent offers any answer to the import of that holding here.[1]

2. Respondents contend that no conflict exists here because every court of appeals, like the Ninth

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[1] While ignoring *Boerne*, the government claims that two snippets of RFRA's legislative history show that Congress intended RFRA's "substantial burden" test to exclude burdens like the one here. *See* SG BIO 16-17. To whatever extent legislative reports are relevant, however, the House Judiciary Committee's Report on the legislation makes clear that the Ninth Circuit's coercion-based definition of the phrase is unduly restrictive. That report explains that in order to trigger the statute, "government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6 (1993).

Circuit, defines "substantially burdening" as "coerc[ing] an individual to engage in or to forgo engaging in religious exercise." SG BIO 20; *accord* Snowbowl BIO 30. This is incorrect. The test that the Eighth and Tenth Circuits have adopted has nothing to do with coercion. Those circuits ask whether governmental action "significantly inhibit[s] or constrain[s] [religious] conduct or expression" or "meaningfully curtail[s]" an individual's "ability to express adherence to his or her faith." *Werner v. McCotter,* 49 F.3d 1476, 1480 (10th Cir. 1995); *accord Weir v. Nix,* 114 F.3d 817, 820 (8th Cir. 1997).

While the government suggests there are nothing more than "semantic differences" between this test and the Ninth Circuit's, SG BIO 20, the government's own actions belie this suggestion. In *Comanche Nation v. United States*, No. CIV-08-849-D, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008), a Native American tribe objected to the government's plan to build a military training facility in a location that would have significantly inhibited the "spiritual experience" of tribal members. *Id.* at *17. Faced with the strength of that claim, the government urged the district court to disregard Tenth Circuit RFRA law in favor of the more "restrictive" definition of "substantial burden" that the Ninth Circuit adopted in this case. *Id.* at *3 n.5. The district court naturally rejected that dramatic request. The government then cancelled the project, further suggesting it did not think it could prevail under Tenth Circuit law. And even now, neither the government nor Snowbowl contests the correctness of the district court's ruling, under binding Tenth Circuit precedent, that the government's noncoercive

activity imposed a substantial burden on the Comanche Nation's religious liberty. This silence confirms that this case would come out differently in that circuit or in the Eighth Circuit.

One cannot predict with equal certainty how this case would come out in the circuits adopting intermediate definitions of RFRA's "substantial burden" requirement. But the government's suggestion that these courts would reach the same conclusion as the Ninth Circuit because they, too, "look[] to this Court's pre-*Smith* Free Exercise Clause cases to determine whether a challenged government action substantially burdens religious exercise," SG BIO 23, surely oversimplifies the matter. It is widely acknowledged, with all due respect to this Court, that "the pre-*Smith* accommodation jurisprudence as a whole was laced with confusion and contradiction." Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct,* 61 U. Chi. L. Rev. 1245, 1307 (1994). Indeed, the Eleventh Circuit itself, one of the courts taking the intermediate view, has noted that this Court's pre-*Smith* jurisprudence "varied over time," such that *Lyng*'s emphasis on coercion was inconsistent with earlier decisions applying strict scrutiny to less oppressive governmental actions. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1226-27 (11th Cir. 2004). Accordingly, confusion over the concept of substantially burdening religion will continue to reign until this Court steps in and articulates a uniform test.

3. Respondents' final gambit is to assert, as the Ninth Circuit did, that recognizing the effect of the government's action here for the substantial burden

that it is "would significantly interfere with the government's ability to manage its own land." SG BIO 15; *accord* Snowbowl BIO 32-34. This, of course, is a pure policy argument that should be directed to Congress, not to this Court. That respondents nonetheless press it here is particularly ironic in light of the fact that the *Smith* decision itself emphasized that the proper forum for debating the desirability of accommodating religious practices is "the political process." 494 U.S. at 890. Such a debate commenced following *Smith*, and religious groups succeeded in obtaining enhanced protection of religious liberty in RFRA. It is not for the government, or for this Court, to second-guess the wisdom of the result of that legislative process.

In any event, there is nothing alarming about affording RFRA's "substantial burden" requirement its ordinary meaning. This Court already has explained that it is entirely "feasib[le]" to conduct a "case-by-case" analysis of purported justifications for impinging on religious liberty. *Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 436 (2006). And as a practical matter, the vast majority of governmental actions involving federal land – perhaps including the logging and road-building activities in *Lyng* itself – are narrowly tailored to serve compelling governmental interests in creating energy, developing and harvesting natural resources, and the like. *See* Pet. for Cert. 29-30.

This, however, is the outlier case. Here, the government, in its own words, proposes to allow "contaminat[ion of] the natural resources needed" for the petitioner tribes to perform religious "ceremonies

that have been, and continue to be, the basis for the[ir] cultural identity." Pet. App. 140a (panel opinion) (quoting 1 U.S. FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT FOR ARIZONA SNOWBOWL FACILITIES IMPROVEMENTS 3-18 (2005)). The Navajo medicine man, for example, explained at trial (in testimony that the government insists it does not dispute, *see* SG BIO 15), that spraying recycled wastewater onto the Peaks will render him "unable to perform" the tribe's most important ceremony, the Blessingway – a ceremony that the Navajo have used for centuries to ensure wellbeing and prosperity through a connection with the divine. Pet. App. 141a-42a (panel opinion); *see also* Pet. App. 9a (en banc opinion). And all this to enable slightly better skiing at an already functioning commercial ski facility.

It is worth remembering that our government took the Peaks from petitioner tribes. It placed the tribes on reservations and pledged to respect their cultures and traditions. It is hardly implausible that Congress passed a law in 1993 providing under these rare circumstances that the tribes' religious liberty should be respected.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

Louis Denetsosie[b]
ATTORNEY GENERAL
NAVAJO NATION
P.O. Box 2010
Window Rock, AZ 86515

Terence M. Gurley[d]
Zackeree Kelin
Kimberly Y. Schooley
DNA PEOPLE'S LEGAL SERVICES
P.O. Box 306
Window Rock, Navajo Nation (AZ) 86515

Howard M. Shanker[b]
Laura Lynn Berglan
THE SHANKER LAW FIRM PLC
700 East Baseline Road, Bldg B
Tempe, AZ 85283

Jack F. Trope[d]
ASSOCIATION OF AMERICAN INDIAN AFFAIRS
966 Hungerford Drive, Suite 12B
Rockville, MD 20850

Amy Howe[a]
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

Jeffrey L. Fisher[a]
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081

A. Scott Canty[c]
OFFICE OF GENERAL COUNSEL
The Hopi Tribe
P.O. Box 123
Kykotsmovi, AZ 86039

James E. Scarboro[c]
Timothy Macdonald
Holly E. Sterrett
ARNOLD & PORTER LLP
Suite 4500, 370 Seventeenth Street
Denver, CO 80202-1370

Thomas C. Goldstein[a]
AKIN, GUMP, STRAUSS, HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

[a] *Counsel for Petitioners*

[b] *Counsel for Petitioners Navajo Nation, White Mountain Apache Tribe, Yavapai-Apache Tribe, Havasupai Tribe, Rex Tilousi, Dianna Uqualla, and Flagstaff Activist Network*

[c] *Counsel for Petitioner Hopi Tribe*

[d] *Counsel for Petitioners Hualapai Tribe, Norris Nez, and Bill Bucky Preston*

May 2009

AMICUS CURIAE BRIEF

19 (4)

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BRIEF OF THE FRIENDS COMMITTEE ON NATIONAL LEGISLATION, THE LEADERSHIP CONFERENCE OF WOMEN RELIGIOUS, THE NATIONAL COMMITTEE FOR AMISH RELIGIOUS FREEDOM, GRADYE PARSONS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE RUTHERFORD INSTITUTE, AND THE PRESIDING BISHOP OF THE EPISCOPAL CHURCH AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Robert L. Greene, Jr.*
Roman P. Storzer
Storzer & Greene, P.L.L.C.
110 Wall Street, 11th Floor
New York, New York 10005
(212) 943-4343
*Counsel of Record

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA
22906

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IDENTITY & INTEREST OF *AMICI*[1]

The Friends Committee on National Legislation ("FCNL") is a Quaker lobby in the public interest, and the largest peace lobby in Washington, D.C. Founded in 1943 by members of the Religious Society of Friends (Quakers), FCNL staff and volunteers work with a nationwide network of tens of thousands of people from many different races, religions, and cultures to advocate social and economic justice, religious freedom, peace, and good government. The Religious Society of Friends has been deeply committed to religious freedom since its founding in England in the 1650s. One of its prominent early members founded Pennsylvania to be a haven of religious freedom and his concepts were reflected in the First Amendment protections of religious freedom.

The Leadership Conference of Women Religious is a membership organization of elected leaders of religious congregations in the United States representing approximately 67,000 Catholic sisters.

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[1] Pursuant to Rule 37.2, all parties were given timely notice and consented to the filing of this brief. Pursuant to Rule 37.6, no party or counsel to any party authored any part of this brief or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

It has a deep belief in religious freedom and respect for religious rituals of Native Americans.

The National Committee for Amish Religious Freedom was formed at a national meeting of friends of the Amish held at the University of Chicago in 1967 in response to the facts that the Amish throughout the United States were experiencing many governmental impositions, and that Amish religious beliefs often prevent them from defending themselves in legal proceedings. The National Committee for Amish Religious Freedom has undertaken the defense of constitutional rights of the Amish in many cases throughout the United States. Of particular note in this instance is ist role in the representation of the Amish respondents in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case central to the issues that the petitioner seeks to have reviewed.

Gradye Parsons, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.3 million members in more than 10,000 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. This brief is consistent with the policies adopted by the General Assembly regarding the free exercise of religion clause of the First Amendment of the U.S. Constitution. The religious

liberty and church autonomy guarantees of this clause are foundational to our understanding of the relationship between the church and state. The General Assembly has interpreted that the First Amendment applies when a person's right to express their religion is substantially burdened by actions of the federal government. Additionally, since the end of the Second World War, Presbyterian General Assemblies have consistently taken progressive positions on issues affecting Native Americans. An area of abiding concern for Presbyterians is that Native Americans have full freedom to practice their religion. The 200th General Assembly (1988) directed: That the PC (U.S.A.), as a matter of policy, sign on as amicus curiae to briefs that argue for the protection of First Amendment rights to practice land theologies, and that the PC (U.S.A.) join with other churches, civil liberties organizations, and traditional Indian people in an effort to bring to national awareness the gross violations of the First Amendment rights of traditional Indian People. The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia.

Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. In particular, The Rutherford Institute provides representation and counsel to persons whose rights to freely exercise their religion have been violated, and on numerous occasions has presented claims in state and federal courts asserting violations of the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act, and the Religious Land Use and Institutionalized Persons Act. The Institute also strives to educate the public about constitutional and human rights issues. The Rutherford Institute not only has represented parties in proceedings before this Court, but also has filed amicus curiae briefs in many of this Court's cases involving individual civil liberties.

The Presiding Bishop of the Episcopal Church, the Most Rev. Katharine Jefferts Schori, is the Chief Pastor of this hierarchical religious denomination of over 2 million members in some 7700 worshipping congregations in the United States and 16 other countries. The Episcopal Church has a significant ministry to Native Americans throughout the United States and maintains a "Navajo Area Mission" of members of that Nation on its reservation in parts of the States of Arizona, New Mexico, and Utah. The issues in this case involving the interpretation of RFRA are, moreover, of significance to the Church beyond its ministry to Native Americans and extend into numerous other contexts.

ARGUMENT

I. A Coherent Definition Of Substantial Burden Under Federal Civil Rights Laws Is Vital To Protect The Vitality Of Religious Expression In The United States.

The right of individuals to exercise a wide variety of religious belief is a central aspect of our Nation's protection of fundamental rights. The *amici*, both as religious organizations and as organizations concerned with the free exercise of religion, have direct concern for the ability of persons of all religious traditions to practice as their faith dictates. Federal and state laws that protect the free exercise of religion are therefore of great and immediate significance to them.

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et seq.*, both provide a well-established mechanism to balance the important interests of religious exercise with the interests of the State. However, that balancing takes place only after the religious practitioner establishes that the governmental action in question will "substantially burden" its religious practice. This concept of substantial burden is thus the threshold issue; unless it is crossed, there is no balancing of competing interests and therefore no opportunity to protect legitimate religious activity.

The present split among the Circuits as to the standard to be applied when determining what constitutes a substantial burden on religious exercise, and the extraordinarily limited scope that the Ninth Circuit established, is therefore of great significance. Such a narrow and, we submit, incorrect reading of the term prevents consideration of these competing interests and thereby inappropriately limits the application of those statutes to a narrower scope than mandated by their text and by Congress' purpose in enacting them.

Amici will not reiterate the arguments of the Petitioners, with which they agree. We seek to add our voices to theirs in requesting that the Court clearly articulate a standard that would give effect to the words and intent of these statutes and provide essential protection to the expression of religion. We believe that an understanding of the scope of religious practices by the bodies that the *amici* represent and the necessity of protection will assist the Court in deciding whether to grant certiorari.

II. Interpretative Decisions Regarding "Substantial Burdens" Under The Religious Freedom Restoration Act Also Affect Claims Under The Religious Land Use And Institutionalized Persons Act And State Religious Freedom Laws.

While RFRA was held to apply only to the federal government in *City of Boerne v. Flores*, 521 U.S. 507 (1997), its substantial burden and

compelling interest test has been held to be the "same standard" as that of the Religious Land Use and Institutionalized Persons Act. 42 U.S.C. § 2000cc(a)(1); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006). Thus, the substantial burden standard enunciated by the Ninth Circuit has implications for all land use and institutionalized persons issues involving state and local governments.

Several States have also enacted Religious Freedom Restoration Acts or similar statutes of their own that rely on a "substantial burden" analysis: Alabama (ALA. CONST. Art. I, § 3.01); Connecticut (CONN. GEN. STAT. § 52-571b *et seq.*); Florida (West's F.S.A. § 761.01 *et seq.*); Idaho (I.C. § 73-401 *et seq.*); Illinois (775 I.L.C.S. 35/1 *et seq.*); New Mexico (N.M.S.A. § 28-22-1 *et seq.*); Oklahoma (51 OKL. ST. ANN. § 251 *et seq.*); Pennsylvania (71 P.S. § 2401 *et seq.*); Rhode Island (GEN. LAWS § 42-80.1-1 *et seq.*); South Carolina (S.C.C.A. § 1-32-20 *et seq.*); and Texas (V.T.C.A. CIVIL PRACTICE AND REMEDIES CODE, T.5 § 110.001, *et seq.*).

Some state courts also rely upon federal RFRA and RLUIPA precedent in the interpretation and application of their own RFRAs. *See, e.g., Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning and Zoning Com'n of Town of Newtown*, 941 A.2d 868 (Conn. 2008); *Warner v. City of Boca Raton*, 887 So. 2d 1023 (Fla. 2004).

Still other State Supreme Courts have interpreted their own constitutions by referencing this standard and federal precedent. Among the

states holding that their state constitutions still require application of the strict scrutiny standard to religious liberty claims are Indiana, *City Chapel Evangelical Free Inc. v. City of South Bend ex rel. Dept. of Redevelopment*, 744 N.E.2d 443 (Ind. 2001); Minnesota, *Odenthal v. Minnesota Conference of Seventh-Day Adventists*, 649 N.W.2d 426 (Minn. 2002); Missouri, *Oliver v. State Tax Commission Of Missouri*, 37 S.W.3d 243 (Mo. 2001); Ohio, *Humphrey v. Lane*, 728 N.E.2d 1039 (Ohio 2000); Washington, *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174 (Wash. 1992); and Wisconsin; *State v. Miller*, 549 N.W.2d 235 (Wis. 1996).

The application of all such laws is impacted by the current conflict with respect to the "substantial burden" standard and the Ninth Circuit's decision.

III. The Restrictive "Substantial Burden" Standard Of The Ninth Circuit And Unsettled Circuit Law Unreasonably Restricts The Applicability Of Religious Freedom Laws To Protect A Wide Variety Of Religious Activity.

The petitioners carefully lay out the widely varying definitions of substantial burden that are currently being applied by the Circuits and *amici* will not repeat their arguments. However, there are certain clear flaws in the Ninth Circuit's new definition that we as religious bodies will demonstrate.

a. The new Ninth Circuit "substantial burden" definition would permit a wide range of governmental action to obstruct the free exercise of religion.

The Ninth Circuit panel held that a substantial burden is one that "prevent[s] the plaintiff from engaging in [religious] conduct or having a religious experience," Pet. App. 146a (quoting *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (internal quotation marks omitted) (alterations in original), and understood that authorizing the discharge of reclaimed sewage on the San Francisco Peaks would substantially burden the tribes' religious exercise under both Ninth Circuit precedent and the ordinary meaning of the phrase. However, the court *en banc* reinterpreted the phrase to adopt a narrower meaning, limiting it to the burdens imposed in the specific factual contexts of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Pet. App. 7a. It held:

> Under RFRA, a "substantial burden" is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of criminal or civil sanctions (*Yoder*).

Pet. App. 20a. Since spraying sewage water on the San Francisco Peaks would not condition any government benefit on abstaining from religious conduct, nor would it prohibit petitioners from

engaging in such exercise upon pain of official sanction, the burden was therefore not "substantial."

As noted by the petitioners, this test is at odds with the statute's plain language and its congressional purpose. It is also not based on any actual language in *Sherbert* or *Yoder*, neither of which used the term "substantial burden." It shifts the issue of what constitutes a substantial burden under RFRA from a case-by-case inquiry into the impact on the religious practice at issue to the very different question of the *nature of the governmental action* that creates the burden, limiting it to the deprivation of governmental benefits or cri nal or civil coercion. *Sherbert* cannot be interpreted to support such an approach, since that decision focused its inquiry squarely on the effect of a governmental action on the religious practice at issue, and not on the *form* of the governmental action:

> But this is only the beginning, not the end, of our inquiry. For '(i)f the purpose or effect of a law is to impede the observance of one or all religions . . . , that law is constitutionally invalid even though the burden may be characterized as being only indirect.'

Sherbert, 374 U.S. at 403-4 (footnote and citations omitted). Similarly, the *Yoder* Court extensively reviewed Amish history and religious belief and practice. 406 U.S. at 216-18. The shift of the focus of inquiry from the effect on religious belief to the type of governmental regulation cannot be

supported by these precedents.

The *en banc* majority, ignoring the statutory language covering all acts of the federal government, has simply written out of the statute innumerable types of governmental actions that could burden religion. The Ninth Circuit's standard would be at odds with the decisions of various other federal circuits and state supreme courts that have not adopted such a binary approach to determining whether a burden is substantial.

Desecration of holy sites, the example presented in the Petition, is but one example. The history of religion's often tumultuous relationship with the government is replete with examples of governmental destruction of religious buildings and sacred objects. The Ninth Circuit's standard would allow such actions because while the burden would be severe and certainly "substantial," as that term is commonly understood, they would not render religious exercise punishable by sanctions or condition any government benefit upon its avoidance. This is *reductio ad absurdum*, as the modern equivalent of such actions—the government's exercise of its eminent domain powers—have been used to stifle religious exercise by simply taking religious property. *See, e.g.*, *Albanian Associated Fund v. Township of Wayne*, 2007 WL 2904194, at *7 (D.N.J. 2007); *Cottonwood Christian Center v. Cypress Redevelopment Agency*,

218 F. Supp. 2d 1203, 1226-1227 (C.D. Cal. 2002).[2]

Prisoners are particularly affected by this ruling, as RFRA protects inmates in federal institutions and RLUIPA guards such rights in state prisons. Given the fact that all aspects of daily life in penal institutions are controlled by the government, an analysis that finds burdens on religious exercise only in the sorts of actions enumerated by the Ninth Circuit would negate the body of law balancing religious freedom with legitimate governmental interests in this context.

The Third Circuit noted this difficulty in *Washington v. Klem*, where it understood that "transferring these definitions, which often arise in the denial of unemployment benefits, to a prison setting has not always been seamless because of the different factual scenarios presented by the institutional milieu."[3] 497 F.3d 272, 278 (3d Cir.

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[2] Both cases involved RLUIPA, which is similarly limited to actions that "substantially burden" religious exercise. 42 U.S.C. § 2000cc(a)(1) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, ...").

[3] The Third Circuit also noted that applying this Court's holdings to the RLUIPA context "runs into trouble . . . because Supreme Court precedent with respect to the definition of 'substantial burden' in the Free Exercise Clause context has not always been consistent." *Washington*, 497 F.3d at 278.

2007). After an extended analysis of the meaning of the term "substantial burden" under the Religious Land Use and Institutionalized Persons Act, the court held that a limitation on the number of books inmates may possess in their cells did substantially burden the plaintiff's religious exercise. This would not comport with the new Ninth Circuit standard.

Nor can the standard be coherently applied to the land use branch of RLUIPA. In *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007), the Second Circuit found that the denial of a land use permit to expand a Jewish school constituted a substantial burden on the schools' religious exercise because there was no viable alternative that it deemed adequate to teach its students. The court observed that the *Sherbert* framework was simply not applicable:

> [I]n the context of land use, a religious institution is not ordinarily faced with the same dilemma of choosing between religious precepts and government benefits. When a municipality denies a religious institution the right to expand its facilities, it is more difficult to speak of substantial pressure to change religious behavior, because in light of the denial the renovation simply cannot proceed.

Id. at 348-9. The religious body was not coerced into performing any act contrary to their religious beliefs by the threat of criminal or civil sanctions as in *Yoder*. As is often the case in land use issues, the governmental action that burdens religious exercise

by withholding necessary permissions does not neatly fit into either of the two narrow categories circumscribed by the new Ninth Circuit definition.

The limitation of substantial burden to the particular fact patterns involved in *Sherbert* and *Yoder* has the effect of distorting the proper inquiry into the nature of the effect of governmental action on religious exercise. Neither *Sherbert* nor *Yoder* suggest that the Court was attempting to define the term substantial burden or that their particular fact patterns should define the outer limits of protected religious exercise, and they should not be used to do so.

As both *Washington* and *Westchester Day School* (among many other examples)—read in contrast with the decision below—demonstrate, guidance is sorely needed.

b. The new Ninth Circuit "substantial burden" definition misunderstands the nature of religious activity and thus the nature of the protection embodied in RFRA, RLUIPA and State RFRAs.

A central aspect of the *en banc* majority's reasoning was that the interior "spiritual" experience of religion is not to be protected by RFRA. As the majority stated:

> Thus, the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual

> experience. That is, the presence of the artificial snow on the Peaks is offensive to the Plaintiffs' feelings about their religion and will decrease the spiritual fulfillment Plaintiffs get from practicing their religion on the mountain. Nevertheless, a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a "substantial burden"—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion.

Pet. App. 6a, 7a. Such subjective religious experience, the court held, could not be "substantially burden[ed]" within the meaning of this Court's precedents because there was no threat of sanctions or conditioning of government benefits. *Id.*

To claim that the subjective experience of religious practice is unworthy of government concern is to entirely ignore the very nature of religious practice. Actions are religious precisely because of their subjective spiritual nature. Eating bread and drinking wine become the act of communion with Christ because of the spiritual convictions of the recipient. Sitting in silence waiting for the inspiration of the divine becomes "worship" to Quakers precisely because of their internal spiritual experience of the act. Eating or not eating certain foods at certain times is a religious act because of the internal subjective

purpose that the believer has. This is true of virtually all actions done for a religious purpose. This is the essence of the "exercise" of religion.

As Friedrich Schleiermacher, the father of modern liberal theology, wrote:

> Religion is the outcome neither of the fear of death, nor of the fear of God. It answers a deep need in man. It is neither a metaphysic, nor a morality, but above all and essentially an intuition and a feeling. . . . Dogmas are not, properly speaking, part of religion: rather it is that they are derived from it. Religion is the miracle of direct relationship with the infinite; and dogmas are the reflection of this miracle.

FRIEDRICH SCHLEIERMACHER, ADDRESSES ON RELIGION (1799).

To suggest, as the *en banc* majority does, that the government is free to ignore the "subjective" spiritual nature of religious practice without any consideration of the interests of such religious practice is to set a dangerous precedent. Requiring religious claimants to demonstrate that an "objective" spiritual experience—whatever that might mean—was burdened will be to place finders of fact in an unenviable and constitutionally impermissible position: to become arbiters of religious truth. This is not permitted.

> The religious views espoused by respondents might seem incredible, if not preposterous, to

> most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

United States v. Ballard, 322 U.S. 78, 87 (1944).

IV. A Proper Application Of The Compelling Interest Test Would Meet The Congressional Purpose Of Protecting The Free Exercise Of Religion Without Overwhelming Governmental Activities.

RFRA, RLUIPA and the state RFRAs provide a mechanism for the balancing of the fundamental interest in free exercise of religion with other important governmental interests. Congress specifically found in RFRA that:

> (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution; [and]
>
> (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

42 U.S.C. § 2000bb(a). This compelling interest test, which requires that the substantial burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest," *id.* § 2000bb-1(a), does not automatically mean that any religious exercise must be free of government interference. It provides a mechanism "for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a).

As Justice O'Connor wrote in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, citing extensive precedent:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. . . . [W]e have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

494 U.S. 872, 894-95 (1990) (O'Connor, J., concurring).

With respect to religious liberty questions, the application of this test has far more often than not resulted in findings that uphold governmental action. In an empirical study of the application of

the strict scrutiny standard from 1990 to 2003, the author found 73 final published decisions applying the test to religious liberty cases under the Free Exercise Clause, RFRA and RLUIPA. In 53 of those cases, the government action survived strict scrutiny and was upheld. Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 857-58 (2006). And when examining only statutory RFRA and RLUIPA cases the challenged laws were upheld at an even higher rate: 72%. *Id.* at 860.

The *en banc* majority's conclusion that to affirm a standard other than the sanction/benefit test would subject the government "to the personalized oversight of millions of citizens" and that "[e]ach citizen would hold an individual veto to prohibit the government action," Pet. App. 7a, is therefore unfounded. It does not comport with the realities of the application of the strict scrutiny test to religious liberty claims and there is no need to prevent legitimate claims of substantial (but not absolute) infringement of religious liberty from being reviewed under the strict scrutiny test.

CONCLUSION

Amici believe that this case has vital significance for the religious observance of all Americans. We therefore urge the Court to grant certiorari.

Respectfully submitted,

Robert L. Greene, Jr.*
Roman P. Storzer
Storzer & Greene, P.L.L.C.
110 Wall Street, 11th Floor
New York, N.Y. 10005

**Counsel of Record*

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD
INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906